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ALEXANDER L. STEVAS,
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No. 82-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK AND SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the pendency of a proposed class action tolls the running of the ninety-day statute of limitations (under 42 U.S.C. §2000e-5(f)(1) (1972) for purposes of allowing Respondent (a putative class member) to file a separate, private Title VII action after certification of the putative class has been denied.

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Respondent, Theodore Parker, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 23, 1982 be denied.

OPINION BELOW

The opinion of the Court of Appeals is reported in 677 F. 2d 391. The opinion of the United States District Court for the District of Maryland is reported in 514 F. Supp. 122. Both opinions appear in the Petitioner's Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 23, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISION AND RULE INVOLVED

United States Code, Title 42, §2000e-5(f)(1) (1976); (See p. 17a of Petitioner's Appendix).

Federal Rules of Civil Procedure 23; (See p. 18a of Petitioner's Appendix).

STATEMENT OF THE CASE

The facts of the case are stated fully by the Petitioner in its Petition

For Certiorari and the decision of the District Court and Court of Appeals. (See Petitioner's Appendix).

REASONS FOR NOT GRANTING THE WRIT

1. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISIONS IN EISEN v. CARLISLE & JACQUELIN AND AMERICAN PIPE AND CONSTRUCTION CO. v. UTAH

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2149, 40 L. Ed. 2d 732 (1974), in deciding that notice must be sent to all members of a Rule 23(b)(3) class because, inter alia, members of the class have a right to "opt out" of the class, the Court noted:

> "Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in American Pipe ...which established that commencement of a class action tolls the applicable statute of limitations as to all

members of the class."

Id. 417 U.S. at 176 n. 13, 94 S. Ct. at 2152 n. 13, 40 L. Ed. 2d at 748 n. 13.

In disposing of the petitioner's second contention, the Court stated:

> "Second, petitioner contends that individual notice is unnecessary in this case, because no prospective class member has a large enough stake in the matter to justify separate litigation of his individual claim. Hence, class members lack any incentive to opt out of the class action even if notified.
>
> The short answer to these arguments is that individual notice to identifiable class is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. As the Advisory Committee's Note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit. 28 U.S.C. App., pp. 7765, 7768. Accordingly, each class member who can be identified through reasonable effort must be notified that he may request exclu-

> sion from the action and thereby preserve his opportunity to press his claim separate ..." (emphasis added).

Id. 417 U.S. at 176. This language clearly shows that this Court has resolved this issue, and there is no need to grant certiorari, and it should accordingly affirm Parker v. Crown, Cork & Seal Company, Inc., 677 F. 2d 391 (4th Cir. 1982).

2. THE DECISION BELOW IS CONSISTENT WITH EXISTING SUPREME COURT LAW WHICH SOLVES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE JUDICIAL ADMINISTRATION OF CASES BROUGHT PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

In American Pipe and Construction Co. v. Utah, 414 U.S. 538, 554-556 (1974), the Court set forth the policy reasons for tolling the limitations period with the commencement of a suit as a class action.

> "As the Court stated in Order of Railroad Telegraphers v. Railway Express Agency, 321

U.S. 342, statutory limitation periods are 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' Id., at 348-349. The policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights,' Burnett v. New York Central R. Co., 380 U.S. 424, 428, are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether

> the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.
>
> Since the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute. While criticisms of Rule 23 and its impact on the federal courts have been both numerous and trenchant, ... this interpretation of the Rule is nonetheless necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." (footnote and citations omitted).

The Petitioner argues, however, that where a defendant is not only subject to liability through a class action and/or individual actions by the named class representative plus intervenors, but is also subject to further liability in separate actions by any one or all of

the putative class members, there is insufficient notice to the class action defendant to justify an equitable tolling of the statute of limitations.

This argument is specious. As the facts of this case clearly show, the Respondent, a terminated black employee, was a member of the proposed class in Pendelton v. Crown, Cork & Seal Co., Inc., Civil No. M-78-1734 (D. Md. filed Sept. 15, 1978). The Petitioner was well aware that the Respondent was a member of the class and it would be required to defend against his claim whether it was at the liability stage or backpay stage. Teamsters v. U.S., 431 U.S. 324, 359, 361-362 (1977). Thus, it was on sufficient notice that it could be required to defend against the suit whether in a separate lawsuit or as a part of a class or intervention action.

The Petitioner further argues that

the discovery and proof in an individual Title VII action is so different from the discovery and proof in a Title VII class action that the notice given to it by the commencement of a class action is insufficient to put it on notice as to the claims of each individual class member, and thus, it would be unduly prejudiced by the filing of a new independent individual lawsuit.

This argument is contrary to the holding in American Pipe and the Petitioner's own arguments. While the Petitioner agrees that the Respondent could have intervened in the class suit and presented his individual case, and it would have been required to defend against it, it argues that it could not defend against a separate lawsuit. This makes no sense whatsoever, in each instance it has been given the same notice, and as a practical

matter, whether it is an intervention or a separate lawsuit the plaintiff and the defendant would be put to the same burdens of proof.

Moreover, the Petitioner's argument that it would be prejudiced because the burdens of proof in an individual action and a class action are so different that it would be prejudiced by a new lawsuit has no merit whatsoever.

Respondent submits that it is well recognized that statistical evidence of class-wide discrimination, the same as that used in class actions may be used to support individual causes of action. Teamsters v. U.S., supra. at 335 n. 15; McDonnell Douglas v. Green, 411 U.S. 792, 804 (1973); Wright v. National Archives and Record Service, 609 F. 2d 702, 711 n. 8 (4th Cir. 1979). The Court in individual actions can order class-wide injunc-

tive relief for what is in effect the plaintiff's class. See Title VII §706(g); Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 1201-1202 (7th Cir.), cert. denied, 404 U.S. 991, (1971), on remand 56 FRD 420 (D. Ill. 1972); Meyer v. Brown & Root Constr. Co., 661 F. 2d 369, 374 (5th Cir. 1981).

3. THE FOURTH CIRCUIT'S INTERPRETATION OF THE TOLLING RULE IS CONSISTENT WITH THE PURPOSE OF RULE 23, F.R.CIV.P. AND THE INTERPRETATION URGED BY THE PETITIONER AND OTHER CIRCUITS WILL RESULT IN A MULTIPLICITY OF LITIGATION WHICH RULE 23 F.R.CIV.P. WAS DESIGNED TO AVOID

The Second and Ninth Circuits have held that the tolling rule is only applicable to those putative class members who file timely motions to intervene in the proposed class action lawsuit. Arneil v. Ramsey, 550 F. 2d 774 (2nd Cir. 1977);

Paulak v. Church, 681 F. 2d 617 (9th Cir. 1982). Petitioner urges this interpretation of American Pipe, supra. by this Court.

This interpretation of the rule would result in the multiplicity of litigation that Rule 23 F.R.Civ.P. was designed to avoid. It would encourage the filing of individual suits and motions to intervene prior to the running of the limitations period, or while the issue of class certification was unresolved adding additional burden and expense to the defendant. In addition, intervention would require class members to intervene in lawsuits which may be located in other Districts far from their residences. Thus, the rule of American Pipe, if limited to intervenors, might achieve the inequitable result of allowing some putative members of the class to obtain an adjudication of

their claims while excluding others.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted

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